BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CASCADE POLE COMPANY, Appellant, v. State of Washington, DEPARTMENT OF ECOLOGY, Respondent.	PCHB NO. 85-79 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER

THIS MATTER is Cascade Pole Company Inc.'s ("Cascade Pole") appeal of the Washington State Department of Ecology's ("DOE") issuance of regulatory Order No. DE 85-174 for alleged violations of the State's "Dangerous Waste Regulations", Chpt. 173-303 WAC, at Cascade Pole's wood treating facility in Tacoma, Washington.

The Board held a formal hearing on January 26, 1987, in Lacey, Washington. Board Members present were: Judith A. Bendor (Presiding), Lawrence J. Faulk (Chairman) and Wick Dufford. Appellant Cascade Pole was represented by Attorneys Lynda L. Brothers and William D. Maer, of Heller, Ehrman, White and McAuliffe. Respondent DOE was represented

by Assistant Attorney General Jay J. Manning. A court reporter from Gene Barker & Associates recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted and examined. Arguments were made. Post-hearing briefs and Proposed Findings of Fact were filed by March 17, 1987, and were reviewed. From the foregoing, the Board makes these:

FINDINGS OF FACT

I

Appellant Cascade Pole Company, Inc., is a company doing business in the State of Washington. It operates a wood treating facility located in Tacoma, Washington. The facility is a zero discharge facility. That is, no discharge of wastewater is allowed to land or to water.

II

The facility treats and preserves wood by two different processes: water-borne which uses preservatives copper chromearsenate (CCA) and ammonia chromearsenate (ACA or ACZA), and oil-based, known as the "Boultonizing" process, which uses pentachlorophenol ("penta") or creosote as the preservative.

In the boultonizing process at Cascade Pole, raw wood is placed in a retort, a large cylindrical pressure vessel. The liquid wood preservative is placed in the retort, which is then heated to the boiling point. The heating and resulting increase in pressure forces the preserving chemical into the wood itself, and, when the wood is

green or wet, forces water from the wood. The amount of heating time in the retort depends upon the woods' wetness. Each cubic foot of green wood generates up to one gallon of water. The daily amount of water so generated depends upon the volume and wetness of the wood processed.

III

The water leaves the retort as steam. The steam is cooled by condensers and flows into a series of oil and water separators. The separated oil is then returned to the retort. The water, which contains wood preservatives, is routed to the basin of a cooling tower. This water, which is contaminated with wood preservatives, is co-mingled with water from other stages of the process and on occasion with rainwater from a sump beneath the retorts.

IV

The co-mingled water is then used as a coolant in the facility. It is routed to the condensers and used to cool the contaminated steam leaving the retorts. In the process, this co-mingled water is heated. It is then routed to the cooling tower, located above the cooling tower evaporation basin. During its cooling, a portion of the contaminated water is evaporated and released into the atmosphere. As a result, the water is reduced in volume. The cooled water flows down into the evaporation basin where it co-mingles with other waters (see parag. III above).

V

During parts of the year, Cascade Pole purchases water from the City of Tacoma to add to the cooling process. During this time the cooling tower and basin continues to operate, cooling the contaminated water and reducing its volume. Reducing the cooling water volume is essential to Cascade Pole's "no discharge" operation.

VI

On November 21, 1986, DOE conducted a dangerous waste inspection of the facility and sampled the waters in the cooling tower evaporation basin. Subsequent "EP Tox" sample testing revealed, among other constituents, 89.2 parts per million ("ppm") of chromium and 352 ppm of arsenic. A laboratory bioassay toxicity test for the water at a concentration of 1,000 ppm led to complete mortality.

VII

There is no record that tests were made on the atmospheric emissions from the cooling tower. An EPA study of cooling towers in general which utilize the boultinizing process documents releases of tolvene, phenols and benzenes.

XIII

As a result of the November 21, 1986 inspection and laboratory results, the Department concluded that 15 violations of the implementing regulations Chpt. 173-303 WAC had occurred and ordered McFarland-Cascade, (now appellant Cascade Pole), pursuant to RCW 70.105.095, to:

1. Comply with the following within thirty (30) days of receipt of this Order.

   a. WAC 173-393-400 - Comply with all requirements of an interim status treatment facility.

   b. WAC 173-303-170(1) - Properly designate wastes in the evaporation tank.

   c. WAC 173-303-320(1) - and RCW 90.48.120(2) - Establish procedures for emptying the evaporation tank to allow entry and inspection of the interior, or provide an equivalent test method to prove the structural integrity of this tank and submit this test plan to the Department of Ecology for review and concurrence.

2. Within 30 days of our concurrence on the plan required by 1(c) above, clean out the evaporation tank to inspect structural integrity or test by approved alternate method. Submit notification to the Department of Ecology one week prior to testing.

Order No. DE 85-174 - issued April 11, 1985.

IX

On May 14, 1985, McFarland-Cascade, feeling aggrieved, filed an appeal of Order No. 85-174. This became our PCHB No. 85-79. Appeals of other DOE orders were consolidated for hearing with this appeal (e.g., PCHB Nos. 85-80, 85-105 and 85-150), and these were subsequently settled and dismissed on January 28, 1987, and are not a subject of this Final Order. (In addition, the parties agreed on emptying, cleaning, handling and disposing of the wastewaters, and inspecting the evaporation tank.)

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the subject matter and the parties in this appeal.

II

The key question is, has the Department made a correct threshold determination that dangerous waste treatment was ongoing at the Cascade Pole facility? More specifically, within the terms of Chpt. 70.105 RCW and regulations implemented thereunder, Chpt. 173-303 WAC, the following specific legal issues are:

1. Is the contaminated cooling water at the Tacoma facility a "solid waste"?
2. If it is a solid waste, is it excluded from regulation?
3. If it is not excluded, is it a "dangerous waste" and is it "treated"?

Only if the answers to all the questions are affirmative has DOE issued a lawful order under RCW 70.105.095(1), which states:

> (1) Whenever on the basis on any information the department determines that a person has violated or is about to violate any provision of this chapter, the department may issue an order requiring compliance either immediately or within a specified period of time. The order shall be delivered by registered mail or personally to the person against whom the order is directed.

III

The following Chpt. 173-303 WAC regulatory provisions are

particularly relevant:

WAC 173-303-040 (18) defines "dangerous waste" as:

> those solid wastes designated in WAC 173-303-070 through 173-303-103 as dangerous or extremely hazardous waste. As used in this chapter, the words "dangerous waste" will refer to the full universe of wastes regulated by this chapter (including dangerous and extremely hazardous waste), [...].

WAC 173-303-016(3) defines a "solid waste" as:

> (a) A solid waste is any discarded material that is not excluded by WAC 173-303-017(2) or that is not excluded by variance granted under WAC 173-303-017(5).
>
> (b) A discarded material is any material which is:
>
> (i) abandoned, as explained subsection (4) of this section; or
>
> (ii) recycled, as explained in subsection (5) of this section; or
>
> (iii) considered inherently wastelike, as explained in subsection (6) of this section.

WAC 173-303-016(4) states in pertinent part that:

> (4) Materials are solid waste if they are abandoned by being:
>
> (a) Disposed of;
>
> [. . .]
>
> (c) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

WAC 173-303-016(5) in pertinent part provides:

> (5) Materials are solid wastes if they are recycled--or accumulated, stored, or treated before recycling--as specified in (a) through (d) of this subsection.

[. . .]

(c) Reclaimed Materials noted with a "*" in column 3 of Table 1 are solid wastes when reclaimed.

Referenced Table 1 delineates in pertinent part that spent materials which are reclaimed are solid waste.

Additional relevant definitions at WAC 173-303-040 provide that:

> (24) "Discharge" or "dangerous waste discharge" means the accidental or intentional release of hazardous substances, dangerous waste or dangerous waste constituents such that the substance, waste or a waste constituent may enter or be emitted into the environment. Release includes, but is not limited to, the actions: Spilling, leaking, pumping, pouring, emitting, dumping, emptying, depositing, placing, or injecting.
>
> (25) "Disposal" means the discharging, discarding, or abandoning of dangerous wastes or the treatment, decontamination, or recycling of such wastes once they have been discarded or abandoned. This includes the discharge of any dangerous wastes into or on any land, air, or water.
>
> [. . .]
>
> (83) "Spent material" means any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.

IV

DOE contends that the contaminated water in the cooling basin is solid waste because it is spent material that is reclaimed. We conclude that the water is not "spent material" because its

contamination does not prevent its re-use for cooling.

The portion of contaminated water that is cooled e.g. re-used within the plant, and not emitted into the atmosphere, is not abandoned nor recycled in a manner specified in WAC 173-303-016(5). Therefore, we decide this water is not "discarded material" under WAC 173-303-016(3)(b).

In sum, the water has not been proven to be "solid waste" under Chpt 70.105 RCW or regulations Chpt. 173-303 WAC. (Because DOE does not contend that the contaminated water is "inherently wastelike" pursuant to WAC 173-303-016(b)(iii), we do not reach that issue.)

V

Part of the contaminated cooling water is abandoned, however, because a portion of it is "disposed of" by evaporation into the air. WAC 173-303-016(4)(a). But, because there is no specific test data in the record on these cooling tower emissions, we cannot conclude one way or the other whether the steam is a "dangerous waste" within the meaning of Chpt. 173-303 WAC.

VI

Since it has not been proven that the waters in question are "solid wastes" which must be designated as "dangerous wastes" under Chpt. 70.105 RCW and Chpt. 173-303, Order No. DE 85-174 must be reversed.

Any finding of fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters the following

ORDER

The regulatory Order (DE 85-175) issued by the Department of Ecology to Cascade Pole Company, Inc. is REVERSED.

SO ORDERED this 7th day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

NICK DUFFORD, Chairman

6/7/88

LAWRENCE J. FAULK, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CASCADE POLE CO., Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 85-79 and 85-80 ORDER GRANTING STAY

Appellant having moved for stay of the Department of Ecology regulatory orders (DE 85-174 and DE 85-237) pending our final decision upon review, and the Board having considered:

1. Motion to Stay received May 14, 1985;

2. Affidavit of Les D. Lonning received May 23, 1985;

3. Department of Ecology's Memorandum in Opposition to Motion for Stay received May 24, 1985;

4. Affidavit of Richard Pierce received May 24, 1985;

5. Affidavit of Katherine Burdorff received May 24, 1985;

6. Affidavit of Mackey Smith received May 31, 1985;

7. Appellant's Reply Brief in Support of Appellant's Motion for a Stay received June 3, 1985;

8. The records and files herein; and

9. Having heard the argument of counsel at hearing on June 3, 1985, and being fully advised, NOW THEREFORE, the Board enters the following

FINDINGS OF FACT

I

Appellant, Cascade Pole Co., owns and operates two wood treatment plants, one in Tacoma, the other in Olympia.

II

On April 11, 1985, respondent Department of Ecology issued a regulatory order against each plant asserting violations of rules adopted under the Hazardous Waste Disposal Act, chapter 70.105 RCW. These orders required submission of a plan from Cascade for emptying certain evaporation and product tanks to allow inspection of the interior. Such plans were required 30 days from receipt of the orders and were required to be implemented 30 days after plan approval by Department of Ecology.

III

The Department of Ecology is concerned that leakage from these tanks may be occuring. There have not been interior inspections of the tanks for many years. Liquid within the tank is referred to as wastewater and contains some amount of halogenated hydrocarbon

compounds such as pentachlorophenol or creosote. These would pose a potential hazard to the environment if leaked from the tanks.

IV

There is no direct indication that tank leakage is occurring.

V

Compliance with the deadlines set forth in the orders would necessitate emptying the tanks prior to the final decision of this Board, on review. Such emptying of the tanks and inspection would halt operations at both plants for approximately two weeks. There are 60-70 employees at the two plants.

VI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

Department of Ecology contends that we lack authority to stay hazardous waste compliance orders, when appealed to us, during the pendancy of our review. We disagree. The enabling legislation creating this Board provides that "notwithstanding any other provisions of law to the contrary," Department of Ecology is prohibited from conducting hearings on violations of any rule or regulation made by the Department of Ecology. RCW 43.21B.120. Such quasi-judicial review was made the province of this independent board to avoid "in-house" review as had been practiced by the predecessors

of Department of Ecology. See ITT Rayonier v. Hill, 78 Wn.2d 700 (1970) and State v. Woodward, 84 Wn.2d 329 (1974).

II

Our authority to review hazardous waste compliance orders, which Department of Ecology concedes, implies a coincident authority to stay such orders pending our decision. This is necessary to avoid a Pyrrhic victory where an appellant establishes at hearing that an order was infirm, only after incurring the expense of complying with the order. We have implemented our stay authority by adoption of regulations within our rules of practice. WAC 371-08-104. We possess authority to stay compliance orders appealed to us, during the pendency of our review. Protect Ludlow Bay Committee v. DOE and Pope and Talbot, PCHB No. 84-89 (Order Granting Partial Stay, 1984); Wal-Krue Enterprises, Inc. v. DOE, PCHB No. 83-103 (Order Granting Motion for Stay, 1983); Pacific Solid Waste Disposal, Inc. v. DOE, PCHB No. 81-78 (Order Denying Motion to Remove Stay, 1981); Honican v. DOE and Midilome, Inc., PCHB No. 78-135 (Order Denying Stay, 1978).

III

In deciding whether to grant a stay of compliance orders, the Board will turn for guidance to RCW 7.40.020. Honican (1978), supra, and Port Ludlow (1984), supra. This is the statutory criterion for preliminary injunctions and provides for relief:

> When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the

> litigation would product great injury to the plaintiff; . . .

This has been construed to mean that one seeking a preliminary injunction must show well grounded fear of invasion of a right, and the acts complained of must establish actual and substantial injury or an affirmative prospect thereof. Neilson v. King County, 435 P.2d 664, 72 Wn.2d 720 (1967), LeMaine v. Seals, 287 P.2d 305, 47 Wn.2d 259 (1955), Isthmian S.S. Co. v. National Marine Engineers, 247 P.2d 549, 41 Wn.2d 106 (1952), Senior Citizens League v. Department of Social Security of Washington, 228 P.2d 478, 38 Wn.2d 142 (1951), King County v. Port of Seattle, 223 P.2d 834, 37 Wn.2d 338 (1950), State ex rel Hays v. Wilson, 137 P.2d 105, 17 Wn.2d 105, 17 Wn.2d 670 (1943).

IV

We further conclude that the burden of persuasion is upon Department of Ecology to show that its compliance orders should not be stayed pending our decision, when such a stay is requested by an appellant. A compliance order such as these, seeks to alter the status quo at the appellant's expense prior to the opportunity for hearing and decision. In such cases, Department of Ecology is the party seeking affirmative relief and must show why such early compliance should occur. To the extent that Pacific Solid Waste Disposal (1981), supra, is to the contrary it is overruled.

V

A refusal to issue a stay of these compliance orders would deprive appellant of the fruits of its appeal at substantial economic cost to it.

VI

It has not been shown by Department of Ecology that a stay pending our final decision would produce great injury to the environment or an affirmative prospect thereof.

VII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

ORDER

The compliance orders, DE 85-174 and DE 85-237, are stayed pending issuance of the final order of this Board herein.

DONE at Lacey, Washington this 11th day of June, 1985.

POLLUTION CONTROL HEARINGS BOARD

6/11/85

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice Chairman

WICK DUFFORD, Lawyer Member

WILLIAM A. HARRISON,
Administrative Appeals Judge

CERTIFICATION OF MAILING

I, Janet L. Huff, certify that I mailed, postage prepaid, copies of the foregoing document on the 11th day of June, 1985, to each of the following-named parties at the last known post office addresses, with the proper postage affixed to the respective envelopes:

James m. Beard, Attorney
Douglas B.M. Ehlke & Assoc., P.S.
P. O. Box 3666
Federal Way, WA 98003

Leslie Nellermoe
Assistant Attorney General
Department of Ecology
Mail Stop: PV-11
Olympia, WA 98504

Phillip Miller
Department of Ecology
Mail Stop: PV-11
Olympia, WA 98504

Cascade Pole Company
P.O. Box 1496
Tacoma, WA 98401

Cascade Pole Company
P.O. Box 456
Olympia, WA 98507

Janet L. Huff

JANET L. HUFF, Docket Clerk
POLLUTION CONTROL HEARINGS BOARD